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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1443

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Petitioner,

vs.

MISTER SANDERS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Respondent, Mister Sanders, respectfully prays that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported officially at 522 F 2nd 1167 and is reproduced in Appendix "A" of Petitioner's Petition. The memorandum of the District Court is not reported but it is reproduced in Appendix "C" of Petitioner's Petition.

JURISDICTION

The jurisdictional facts are accurately set forth in Petitioner's Petition.

QUESTIONS INVOLVED

The Questions Presented are as set forth in Petitioner's Petition.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations involved are as set forth in Petitioner's Petition in Appendix "E" thereof.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Petition is substantially accurate.

ARGUMENT

I.

THE OVERWHELMING WEIGHT OF AUTHORITY HOLDS THAT SECTION 205(H) OF THE SOCIAL SECURITY ACT (42 USC 405H) DOES NOT PRECLUDE REVIEW OF THE SECRETARY'S REFUSAL TO REOPEN PRIOR FINAL DECISIONS AND THAT THE APA (5 USC 701-706) IS THE JURISDICTIONAL BASIS FOR SUCH REVIEW.

See *Ruiz-Olan* v. *Secretary of Health, Education and Welfare* (C.A. 1), 511 F 2nd 1056; *Cappadora* v. *Celebrezze* (C.A. 2), 356 F 2nd 1; *Davis* v. *Richardson* (C.A. 3), 460 F 2nd 772; *Lejeune* v. *Mathews* (C.A. 5), 526 F 2nd 950; *Wallace* v. *Weinberger* (C.A. 6), 528 F 2nd 700; *Sanders* v. *Weinberger* (C.A. 7) 522 F 2nd 1167.

Other Circuits have held that where, as in the case at bar, an allegation of "error on the face of the evidence" is made, then the District Court has jurisdiction to review the Secretary's refusal to reopen for the purpose of determining whether the Secretary's own regulations were properly applied. See *Leviner* v. *Richardson* (C.A. 4), 443 F 2d 1338; *Lauritzen* v. *Weinberger* (C.A. 8), 514 F 2d 561. These circuits find jurisdiction to review the Secretary's refusal to reopen a prior decision without regard to the APA.

Thus the 1st, 2d, 3d, 5th, 6th and 7th Circuits have found a jurisdictional basis to review the Secretary's refusal to reopen prior decisions under the APA while the 4th and the 8th Circuits presume jurisdiction where "error on the face of the evidence" is alleged.

Only the 9th Circuit has held to the contrary. See *Stuckey* v. *Weinberger* (C.A. 9) 488 F 2d 904. It should be noted that the *Stuckey* case was decided *en banc* and that five of the justices filed a concurring opinion in which they asserted that "[we] agree with the Second Circuit, for the reasons set forth in *Cappadora* v. *Celebrezze,* 356 F 2d 1 (2d Cir. 1966), that a limited area of judicial review has been afforded by the Administrative Procedure Act, and that the second sentence of 42 USC Sec. 405(h) should not be construed to preclude judicial review; that that sentence 'simply forbids attempts to review *final decisions on the merits* by any route other than provided in Sec. 405(g).' 356 F 2d at 5 (emphasis supplied)." See *Stuckey* v. *Weinberger, supra.*

(The Secretary incorrectly asserted in the case below that the Tenth Circuit is in accord with his contention, citing as authority *Neighbors* v. *Secretary of Health, Education and Welfare* (C.A. 10), 511 F 2d 80. This error was repeated by the Court below in its footnote No. 7, see *Sanders* v. *Weinberger,* 522 F 2d at P. 1170. A reading of the *Neighbors* case however reveals that the APA was nowhere mentioned or considered by the Court of Appeals for the Tenth Circuit.)

The Secretary maintains that this Court's ruling in *Weinberger* v. *Salfi,* 411 U.S. 749 "logically implies that Act [42 USC 405(h)] bars judicial review of the Secretary's refusal to reopen prior final decisions. . . ." (P. 6 of Petition for Writ of Certiorari). However, the Court below in considering this contention correctly observed that "what, and all that, was before the Court in *Salfi* was whether a denial of benefits could be reviewed by a Court proceeding under 28 USC Sec. 1331 . . . the Court did not consider the review

provisions of the Administrative Procedure Act, however, as it found that review was proper under Sec. 405 (g) of the Act. The decision is thus inapposite to the case before us." *Sanders* v. *Weinberger, Secretary of Health, Education and Welfare,* 522 F 2d at P. 1171. Indeed the APA is nowhere mentioned in this Court's decision in *Salfi.*

II.

JUDICIAL REVIEW OF AGENCY ACTION IS THE RULE AND NON-REVIEWABILITY IS THE EXCEPTION.

The Court below noted that "the Supreme Court has held that there is virtually a presumption of judicial review of administrative action. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967), unless a contrary purpose is fairly discernible in the statutory scheme, *Data Processing Service* v. *Camp,* 397 U.S. 150, 157 (1970). Agency action is normally found to be non-reviewable 'only upon a showing of clear and convincing evidence of a contrary legislative intent.' *Abbott Laboratories* v. *Gardner, Supra,* 387 U.S. at 141. Clearly the absence of statutory language expressly authorizing judicial review is insufficient to offset the presumption that administrative action is reviewable. 'Indeed, judicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated.' *Barlow* v. *Collins,* 397 U.S. 159, 166 (1970)." See decision of Court below in *Sanders* v. *Weinberger,* 522 F 2d at P. 1170.

III.

THE ADMINISTRATIVE PROCEDURE ACT CONFERS SUBJECT MATTER JURISDICTION.

In the abstract, there is a division of authority upon this question. (See cases cited by the Court below, 522 F 2d

at P. 1169 as well as the Petitioner's Petition for Writ of Certiorari at P. 12 thereof.) However, with respect to the specific fact question before this Court, *viz,* does the District Court have jurisdiction under the APA to review the Secretary's decision not to reopen for possible abuse of discretion, the Courts which have considered the matter are practically unanimous in holding that the District Court does have such limited jurisdiction. *Ruiz-Olan* v. *Secretary of Health, Education and Welfare, supra; Cappadora* v. *Celebrezze, supra; Davis* v. *Richardson, supra; Lejeune* v. *Mathews, supra; Wallace* v. *Weinberger, supra; Sanders* v. *Weinberger, supra.*

IV.

DENIAL OF THE PETITION FOR WRIT OF CERTIORARI WOULD NOT RESULT IN A "VOLUME OF POTENTIAL RELITIGATION" AS CLAIMED BY THE SECRETARY.

The APA authorizes review of the Secretary's final decision only for an abuse of discretion (5 USC 706 Sec. 10). Here, it is alleged that the Secretary abused his discretion in refusing to reopen a prior decision because of "error on the face of the evidence," particularly since the Secretary's own regulations provide for a reopening of a prior decision *at any time* on such basis. (See 20 CFR 404. 957-8).

Error on the face of the evidence is defined by the Secretary himself as follows: "an error on the face of the evidence exists where, on the basis of all the evidence in the file on which the determination or decision was based and any evidence or record anywhere in the administration at the time such determination or decision was made, it is clear that the determination or decision was incorrect." (as cited in *Lauritzen* v. *Weinberger, supra,* 514 F 2d at P. 563).

It is to be hoped that instances of abuse of discretion in refusing to reopen prior decisions on such basis would be rare indeed. The APA does not authorize successive review of the same factual determinations. The Secretary's apprehension therefore that "persistent claimants would relitigate claims numerous times in hopes of securing a favorable decision" is unfounded and untenable.

CONCLUSION

The issues raised by the Secretary have been considered on numerous occasions by the various Courts of Appeal. Said Courts are nearly unanimous in holding that a jurisdictional basis exists to review the Secretary's refusal to reopen a prior determination either for abuse of discretion under the APA or irrespective of the APA where "error on the face of the evidence" is asserted. Since the leading case of *Cappadora* v. *Celebrezze, supra,* was decided in 1966 only the 9th Circuit in as sharply divided *en banc* decision has held to the contrary. The questions presented by the Secretary have been extensively reviewed. The Petition for Certiorari should be denied.

Respectfully submitted,

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